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No. 10-712

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In The
Supreme Court of the United States

WILLIAM MORRIS, JR., and
RONALD REMUS,

Petitioners,

v.

ROBERT G. SWOFFORD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where two deputy sheriffs enter a property searching for felony suspects, and the deputies are forced to fire on the armed property owner in self-defense, are the circumstances of the deputies' initial entry onto the property relevant to the constitutionality of their subsequent use of force against the property owner?

2. Where two deputy sheriffs enter a property searching for felony suspects, and the owner of the property suddenly confronts the deputies with a gun poised to shoot the deputies in a second or less, is it "clearly established" that the Fourth Amendment requires the deputies give a warning prior to shooting the property owner in self-defense?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rules 12.6 and 14.1(b), the parties to the action below are Robert G. Swofford and Sharon Swofford, Plaintiffs; and, Donald Eslinger, in his official capacity as Sheriff of Seminole County, Florida, and William Morris, Jr., and Ronald Remus, in their individual capacities, Defendants.

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PETITION FOR WRIT OF CERTIORARI

Petitioners William Morris, Jr., and Ronald Remus, at all material times deputy sheriffs in Seminole County, Florida, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit and of the district court below.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in the Appendix at 1-3. It can also be found at *Swofford v. Eslinger*, No. 09-16162, 2010 WL 3422565, at *1 (11th Cir. Sept. 1, 2010) (unpublished decision). The decision of the district court is reported as *Swofford v. Eslinger*, 671 F. Supp. 2d 1289 (M.D. Fla. 2009), and is reproduced in the Appendix at 4-45.

JURISDICTION

On September 1, 2010, the Eleventh Circuit entered judgment. Appendix at 1. Deputies Morris and Remus timely filed a petition for rehearing *en banc* on September 17, 2010. The Eleventh Circuit entered an order denying the petition on October 25, 2010. Appendix at 46. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent Robert G. Swofford seeks damages for an alleged violation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

Section 1983, Title 42, United States Code, provides in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

Seminole County Sheriff's Deputies William Morris, Jr., and Ronald Remus were searching for two felony car burglars in a large open field at approximately 3 a.m. when they were confronted by Plaintiff Robert Swofford. Swofford was walking toward the deputies and was holding a gun in both hands, in the

center of his body, above his waist. The gun was in what is termed the "ready," or "low ready" to fire position. The deputies shot Swofford believing that, if they did not, he would fire at them.

Swofford was the owner of the property onto which the deputies had followed the car burglars from an adjacent apartment complex. Swofford says that he did not realize who the deputies were and that they shined a flashlight in his eyes. While the deputies have testified that they identified themselves and warned Swofford to drop his gun before they fired, Swofford claims that he heard those commands only as the shots were being fired.

He complains that the deputies conducted their operation to find the car burglars in a negligent manner. Swofford ultimately contends that the deputies are personally liable for their use of deadly force against him because the deputies should not have been on his property to begin with.

At the moment he was shot by the deputies, Swofford was walking toward the deputies and had reached a point just 20-25 feet away from them. Swofford's gun was, according to Swofford's trajectory and ballistics expert, just **one second or less** from being in position to fire on the deputies. Several of Swofford's relevant expert diagrams showing how Swofford would have appeared to the deputies are included in the Appendix at 48-50, and the Petitioners urge the Court to view them so as to understand the

immediacy of the threat Swofford posed to the deputies.

This case squarely raises two important legal questions, both of **first impression** for this Court.

First, are criticisms of the deputies' entry onto Swofford's property relevant to the issue of whether the deputies' use of deadly force was constitutional? The deputies were led onto Swofford's property in pursuit of two felony car burglars. Swofford, who was armed, suddenly confronted the deputies, forcing them to fire on him in self-defense.

In the course of the litigation, Swofford has found fault with various aspects of the deputies' entry onto his property. For example, he complains that the deputies entered his property without announcing themselves and that the deputies should have waited for an approaching Sheriff's Office helicopter to join the chase for the burglars because that would have alerted Swofford to the possible presence of law enforcement. The case raises the question as to whether the deputies' use of deadly force, even if reasonable at the very moment they decided to shoot Swofford in self-defense, might nonetheless be unreasonable because their entry onto Swofford's property caused or contributed to the confrontation.

This issue is the subject of sharp disagreement among the lower courts. The Fourth, Sixth, Seventh, and Eighth Circuits all hold that a law enforcement officer's use of deadly force in self-defense is judged based only on the facts at the precise moment the

officer has to make the decision to use deadly force to protect himself, and without regard to whether the officer's pre-use of force conduct, even if unreasonable in some way, caused the need for the use of force. Those courts limit evaluation of the constitutionality of deadly force to consideration of the circumstances immediately preceding the use of deadly force.

Other courts, including the First, Third, and Ninth Circuits, take the opposite position, holding that in certain circumstances an officer's use of deadly force, even if genuinely necessary to save his own life, may be unconstitutional if the officer's preceding actions were unreasonable and caused the need for use of force. The Tenth Circuit has its own approach, holding that, while the focus is on the moment of decision, if a law enforcement officer engages in reckless behavior that leads to the need for use of deadly force, then the officer's culpability in causing that need for deadly force should be considered in deciding whether the force was unconstitutional.

This issue involves the balancing of significant societal interests, law enforcement interests, and constitutional rights that are much broader than the interests of the parties to this case. The constitutional relationship between the deputies' entry onto property and their subsequent use of deadly force in self-defense is the subject of substantial disagreement among the circuit courts. This Court should grant this Petition for Writ of Certiorari and address this important issue.

Second, the case raises the question of whether a pre-use of force warning, one of the factors announced by the Court in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985) for evaluating the constitutionality of use of deadly force, applies to a self-defense case where there is no time to give a warning. One of the key reasons that the district and the circuit courts denied qualified immunity to the deputies was the dispute as to whether warnings were given before, or as, the shots were fired.

As this case arises on denial of a motion for summary judgment based on qualified immunity, one will necessarily credit Swofford's claim that he heard warnings as the shots were fired, as opposed to before the shots were fired. But, that begs the purely legal question as to whether the Fourth Amendment would require that the deputies provide a warning prior to use of deadly force in self-defense against someone at most one second from firing on them.

Garner involved the use of deadly force to stop a fleeing felon whereas the instant case involved a person approaching deputies in a threatening manner such that the deputies had a split-second to react to him. Nonetheless, the lower courts in this case held that the deputies were required to identify themselves and warn Swofford before firing on him. *Swofford v. Eslinger*, 671 F. Supp. 2d 1289, 1304-05, 1309 (M.D. Fla. 2009). This case questions the feasibility of a warning when Swofford was a second or less from firing on the deputies, and it therefore raises the question as to whether a *Garner*-type warning was constitutionally required.

This is a significant issue for the law enforcement community and highlights the fact that there is no guidance from this Court on the use of deadly force by law enforcement purely for self-defense, as opposed to seizure of a fleeing felon as in *Garner*. The Court should grant this Petition for Writ of Certiorari so as to articulate the factors for the constitutional analysis of use of deadly force in self-defense, or at a minimum to limit or modify the warning requirement in *Garner* where a law enforcement officer has no choice but to use deadly force in immediate need of self-defense.

1. The deputies' entry onto Swofford's property.

In the early morning hours of April 20, 2006, Seminole County Sheriff's Deputy Ronald Remus was on bicycle patrol in an apartment complex located in Altamonte Springs, Florida. The apartment complex, Barrington at Mirror Lake Apartments ("Barrington"), had seen a recent spike in automobile burglaries, causing the Sheriff's Office to increase patrols there. (Doc. 97-1, p. 31).

At approximately 2:30 a.m., Remus spotted a Honda, backed into a parking spot with its engine running. Remus saw that next to that car, was another Honda, with two males appearing to be in the process of "punch starting" and stealing the car. As Remus rode by, the two males looked up, panicked, and ran. (Doc. 97-1 pp. 30-35; Doc. 97-2, p. 1).

Remus called out for assistance by radio. He then rode alongside the two suspects as they ran north

along a wooden fence. The suspects appeared to Remus to jump the fence. (Doc. 97-1, pp. 34, 35-37).

Remus rode back to the spot where he had seen the original Honda vehicle, and that car drove out of Barrington, with its lights out. Remus rode a short distance behind it and another deputy, in a patrol vehicle who had responded to Remus' call, pulled that vehicle over. Remus returned to searching for the two car burglars who had fled on foot. (Doc. 97-1; pp. 43-44, 73-74).

Deputy Sheriff William Morris, Jr., a K-9 deputy, arrived at Barrington as Remus renewed his search for the car burglars. Morris used his canine "Strike" to begin a track of the burglars. Strike led Deputies Morris and Remus to a spot along the fence that matched where Remus believed the burglars had jumped over the fence. Morris found a point a few yards away where there appeared to be rotted or loose boards. Morris pulled away a couple of boards so that he and Remus could fit through. (Doc. 96, pp. 74-80, 96-100; Doc. 97-1, p. 47).

The large field on the other side of the fence belonged to Swofford. Swofford's property spans six acres. He bought old cars and kept them on the property to repair and restore. At the point at which the deputies went through the fence in pursuit of the car burglars, Swofford's property appeared commercial in nature. It included an abandoned semi-trailer with high weeds around it, an area formerly used as a commercial nursery, a large warehouse, storage buildings, and several other non-residential buildings. (Doc. 82-1;

Doc. 95-1, pp. 31-38; Doc. 90; Doc. 96, p. 99; Doc. 96-1, pp. 7-8; Doc. 92-1, pp. 5-9).

2. The use of force.

Swofford's home is on the far northeast corner of the six acre property, on the opposite side from where the deputies entered the property. He was awakened by the sound of his dog barking. He got up and went outside to check on what might have caused his dog to bark. Before leaving his house, Swofford armed himself with his own 9 mm pistol. (Doc. 92-1).

Swofford traveled from the east side of the property, where his house was, to the far west side, near the fence abutting Barrington. He checked on several buildings along the way to make sure that they were secure. He reached an area in the field near the fence, knelt in some bushes, and listened. (Doc. 95-1, p. 100; Doc. 95-2, pp. 4-8; Doc. 92-1, p. 14).

Swofford then saw two people come through the fence. One had on a uniform, which Swofford has since described as looking like a UPS uniform. He watched as the two figures, flashlights in hand, moved along the fence between his property and Barrington. These were the deputies, although Swofford states he did not realize that and did not see the dog, Strike. (Doc. 92-1, pp. 19, 40).

The deputies testified that they heard and saw Swofford as he was almost upon them and with his firearm pointed at them. They fired, fearing that Swofford would shoot them if they did not. Swofford's expert on ballistics and trajectory established that

Swofford was walking towards the deputies and was 20-25 feet from the deputies when the deputies fired. Swofford's expert developed diagrams, based on the physical evidence and Swofford's wounds, as to how Swofford would have appeared to the deputies at the moment they fired on him. Again, the relevant diagrams composed by Swofford's expert are attached to this petition in the Appendix at 48-50. (Doc. 96-1, pp. 44-47; Doc. 97-2, pp. 16-19; Doc. 99; Doc. 99-1).[1]

This expert was deposed and testified that, at the moment the deputies fired on him, Swofford's firearm was in the "ready" or "low ready" position. The expert further testified that, from this position, Swofford was one second or less from being able to fire on the deputies. (Doc. 99, pp. 28-36).

The deputies testified that as Swofford approached they did not believe that he was one of the original suspects, but that he was coming at them with a gun and appeared ready to fire on them. The parties agree that warnings were given, but disagree on the timing. The deputies testified that they gave warnings *before* firing, identifying themselves and

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[1] After the shooting incident, and before the litigation, Swofford was interviewed and stated that he was still kneeling in the bushes when shot. However, in the litigation, Swofford later receded from that version of events noting that the combination of medications he was on at the time and the trauma of being shot initially caused some memory confusion for him. Swofford testified that he was in fact standing up and walking toward the deputies and that the physical evidence supported his expert's rendition of events, as reflected in the Appendix. (Doc. 92-1, pp. 23-25; Doc. 102-3; Doc 102, pp 12-13, 39).

telling Swofford to drop his firearm. Swofford testified that he heard warnings, but only *as* the shots were being fired. All testimony and evidence established that the confrontation and use of force lasted mere seconds. (Doc. 96-1, pp. 44-46; Doc. 97-2, pp. 23-24; Doc. 92-1, pp. 19-22).

3. District Court Proceedings.

Swofford sued the deputies, in their individual capacities, and Seminole County Sheriff Donald Eslinger, in his official capacity, under both § 1983 and state law tort theories. The § 1983 claims were divided into two groups, with Swofford claiming first that the deputies' warrantless entry onto his land violated the Fourth Amendment, and second that their use of force against him also violated the Fourth Amendment.

The case was originally filed in state court but the Defendants timely removed it to the United States District Court for the Middle District of Florida. Jurisdiction in the lower court was founded on the presence of a federal question, 28 U.S.C. § 1331.

At the close of discovery, the defendants moved for summary judgment on all claims. The district court granted the deputies qualified immunity as to the § 1983 entry onto land claims. The district court held that, regardless of whether Swofford's property would properly be characterized as curtilage, it was not clearly established that it was curtilage subject to

Fourth Amendment protection. *Swofford*, 671 F. Supp. 2d at 1303; Appendix at 25-26.

The district court, citing the *Garner* factors for evaluation of use of deadly force, denied summary judgment to the deputies on three main theories: first, that there was a dispute as to when warnings were given – that is, whether they were given before or as the deputies began firing on Swofford; second, that it was unclear whether Swofford was actually in a threatening position to the deputies so as to warrant the use of deadly force; and, third, that even though the deputies were entitled to qualified immunity for the § 1983 entry onto property claims, their entry onto the property could be viewed by a jury as generally unreasonable or negligent, that their unreasonable or negligent entry is what led to the need to use force, and that a jury could therefore find that the use of force was constitutionally unreasonable based on the entry onto Swofford's property. The district court also found that Remus could be liable for failing to prevent Morris from firing on Swofford, a failure to intervene claim that had not previously been pled by Swofford. *Swofford*, 671 F. Supp. 2d 1289; Appendix at 4-45.

4. Decisions of the Eleventh Circuit.

The deputies appealed the district court's denial of qualified immunity. Briefing at the Eleventh Circuit was completed on June 17, 2010. On September 1, 2010, the Eleventh Circuit issued a brief judgment

affirming, finding that factual disputes as to whether the deputies would reasonably have perceived Swofford as a threat, whether the deputies knew that Swofford was the property owner, and whether the deputies identified themselves prior to use of force, precluded summary judgment on the use of force claims. The Eleventh Circuit also held that there was sufficient evidence for Swofford to move forward on the failure to intervene claim against Remus. Appendix at 1-3.

The deputies timely filed a petition for rehearing en banc on September 17, 2010. The petition was denied on October 25, 2010. Appendix at 46-47.

REASONS FOR GRANTING THE PETITION

This case presents two important issues that the Court should review by grant of this Petition for Writ of Certiorari. First, the Court should address the question of whether the circumstances surrounding the deputies' entry onto Swofford's property has any bearing on the reasonableness of, and therefore the constitutionality of, their use of deadly force against Swofford when he confronted them. Second, the Court should determine whether the warning factor in *Garner* applies in this self-defense case where the deputies literally had a split-second to decide to use deadly force to defend themselves.

The Court should grant the petition to consider whether a law enforcement officer's conduct prior to the use of deadly force is relevant to the reasonableness of that use of deadly force under the Fourth Amendment. Swofford contends that the deputies' entry onto his property was unreasonable or negligent, and that their entry onto his property set in motion the chain of events leading to the confrontation. The lower courts, particularly the district court, agreed with this argument, holding that a jury might find the force unreasonable, not because it was unjustified in the moment, but because the deputies' entry onto Swofford's property caused the moment to occur.

There is a remarkably sharp conflict among the circuit courts on this issue. Some circuit courts hold that the focus in a use of force case is solely on the moment of decision, and that an officer's conduct prior to that moment, even if it caused or contributed to a confrontation as urged in this case, is completely irrelevant to evaluating the reasonableness of the use of force. Other circuits reject this approach. At least three circuits hold that, even if an officer's use of deadly force in self-defense is completely justified under the circumstances of the confrontation, the force may still be deemed unreasonable if the officer's actions caused or contributed to the confrontation. The inter-circuit conflict on that weighty issue is ripe for resolution in the context of this case.

There is a factual dispute as to whether warnings were given before the deputies fired on Swofford or as they fired. Accepting as one must for qualified

immunity purposes Swofford's best case version of events, the question is whether a warning would be required before use of deadly force in self-defense based on the diagrams in the Appendix at 48-50. The Court should clarify that a warning in such a circumstance is, in the language of *Garner*, not "feasible," and therefore not constitutionally required. At a minimum, the Court should grant the petition to decide that for qualified immunity purposes it was not clearly established by *Garner*, a fleeing felon case, that a warning would be required for the deputies' use of deadly force in self-defense.

I. THE COURT SHOULD GRANT THE PETITION SO AS TO DECIDE WHETHER THE INCIDENT SHOULD BE SEGMENTED INTO ITS DISCRETE CLAIMS, SUCH THAT THE DEPUTIES' USE OF DEADLY FORCE IS EVALUATED WITHOUT REGARD TO THEIR ENTRY ONTO SWOFFORD'S PROPERTY.

Swofford complains that if a reasonable jury concluded that the deputies should not have been on his property then the jury might also find that the use of deadly force was unconstitutional because it was the deputies, not he, who created the need for the use of deadly force. Swofford and the district court are critical of the deputies for the manner in which they generally searched for the suspects and entered the property. Those criticisms include the deputies' failure to announce themselves as they entered the property, failure to wait on a Sheriff's

Office helicopter that was four minutes from the scene, and other similar criticisms. *Swofford*, 671 F. Supp. 2d at 1309; Appendix at 11-12.

The deputies did receive qualified immunity from the district court for their entry onto Swofford's property because it was not clear that the area of the property where events unfolded might be curtilage protected by the Fourth Amendment. *Id.* at 1303; Appendix at 25-26. But, the district court held that Swofford's broad claim that the entry onto his property was unnecessary, or was done in negligent fashion, was nonetheless a factor in evaluating the constitutionality of the deputies' subsequent use of force. Had the deputies not entered Swofford's property in the first place, the district court reasoned, then the confrontation would not have occurred. *Id.* at 1307-08; Appendix at 34. The Eleventh Circuit did not squarely address this issue in its brief judgment.

Some lower federal courts have held that an incident like the one at bar, involving a distinct claim of entry onto property, followed by use of force, is to be analyzed in a strictly "segmented" approach. Under this approach, endorsed primarily by the Fourth, Sixth, Seventh, and Eighth Circuits, the timeline of events is segmented such that each constitutional claim is analyzed without regard to the circumstances surrounding the other.

Cases using the segmenting approach, and rejecting the type of approach used by the district court here of mingling these issues, include *Chappell*

v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009) (court must separate out and consider separately a claim for unreasonable entry onto property from a use of force during an ensuing confrontation in the property; rejecting plaintiff's claim that officers' failure to knock and announce before entering property was a material fact as to reasonableness of subsequent use of force); *Dickerson v. McClellan*, 101 F.3d 1151, 1160-62 (6th Cir. 1996) (holding that officers' entry into property, even if it was unreasonable and created the confrontation that led to the shooting of an occupant, had no role in determining the constitutionality of the use of force); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (officer's actions leading up to use of deadly force, even if unreasonable and causing need for deadly force, irrelevant to reasonableness of use of deadly force); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (endorsing segmenting to focus solely on facts immediately surrounding need for use of force); and, *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (in a deadly force case, the focus is solely on the seizure itself, excluding the officers' actions leading up to it).

The lower courts in this case, particularly the district court, view the events at issue as one seamless incident. However, in a segmented analysis, even if the deputies' entry onto Swofford's property in a but-for sense causes or contributes to the confrontation with Swofford, and even if the entry is in some measure unreasonable, the court evaluates the entry onto property first, and **then separately** judges the constitutionality of the use of force by considering only the facts immediately surrounding the use of

force. That is, the entry onto property, right or wrong, reasonable or unreasonable, has no bearing on the constitutionality of a subsequent use of deadly force.

As the Seventh Circuit has explained:

> We do not return to prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct. Reconsideration will nearly always reveal that something different could have been done if the officer knew the future before it occurred. This is what we mean when we say we refuse to second-guess the officer.

Plakas, 19 F.3d at 1150.

Similarly, and of particular note to the instant case, the Fourth Circuit has held that an officer's failure to identify himself or show his badge, and which the plaintiff alleges contributed to the need for force, is irrelevant to the constitutionality of the use of force if it is in self-defense. *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993). The Fourth Circuit has also held that the focus in a use of force case is "on the very moment when the officer makes the split-second judgment" and that events before that moment are not to be considered in evaluating the constitutionality of the use of force. *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

Other circuit courts, including the First, Third, and Ninth Circuits, have reached the opposite conclusion, holding that pre-use of force actions by a law enforcement officer are properly considered in analyzing whether a subsequent use of force is constitutional.

A number of those cases have explicitly rejected the holdings to the contrary in the cases cited above. The Ninth Circuit in *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002) held that, even where officers' use of deadly force was reasonable, the officers could still be held liable if they acted recklessly in creating the need for use of force. *Id.* at 1189-90 (citing *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) for the proposition that "even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.")

The First Circuit squarely holds that events preceding use of deadly force are relevant to the reasonableness of the force. *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26-7 (1st Cir. 1995) (expressly disagreeing with *Drewitt* and *Carter* on segmenting). The Third Circuit in *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999) also expressly disagreed with a number of the cases cited above in the Seventh and Eighth Circuits on the issue, holding that pre-seizure conduct is part of the totality of the circumstances to be considered in deciding whether the use of force is constitutional. *Id.* at 291.

The Eleventh Circuit has favorably cited the Seventh Circuit's segmenting decision in *Plakas*, holding that only the circumstances immediately surrounding the use of deadly force are relevant in evaluating whether the force is constitutional. *Menuel v. City of Atlanta*, 25 F.3d 990, 996-97 (11th Cir. 1994) (citing *Plakas*, 19 F.3d at 1148-50). On the other

hand, in *Jackson v. Sauls*, 206 F.3d 1156 (11th Cir. 2000), the Eleventh Circuit held that the plaintiffs could sue for injuries caused by use of deadly force during a confrontation that was "caused" by the unreasonable manner of the officers' conduct, even though the defendant officers were entitled to qualified immunity for use of deadly force in self-defense.

The Tenth Circuit takes a middle ground approach, holding that although the focus is on the moment of decision, the acts of an officer leading up to the use of force can render otherwise reasonable force unreasonable if the officer's actions "rise to the level of recklessness, rather than mere negligence" and are "immediately connected" to the use of force. *Medina v. Cram*, 252 F.3d 1124, 1132-33 (10th Cir. 2001).

It is apparent that the circuit courts are in significant disagreement as to whether the actions of an officer, before the moment when he must decide to use deadly force, are relevant to the reasonableness of that use of deadly force. Within that debate is further disagreement about the degree of culpability required to incorporate the officer's pre-use of force actions into the Fourth Amendment analysis of the use of deadly force. Of those circuits that consider pre-use of force conduct relevant to analysis of use of deadly force, some courts include all conduct in that evaluation, even if it is merely negligent. Others will consider the pre-use of force conduct relevant to the reasonableness of the use of force only if that conduct can itself be characterized as reckless or unconstitutional.

In the instant case, the district court below considered the most general of criticisms of the entry onto property, sounding purely in negligence, as relevant to the constitutionality of the deputies' use of force. It is perplexing that the deputies would receive qualified immunity for their entry onto Swofford's property because it did not appear to be curtilage, but that the same entry onto property would serve as the main vehicle by which the district court might characterize the subsequent use of force as unconstitutional.

The district court in this case rejected segmenting and held that the deputies' entry onto Swofford's property could be viewed as unreasonable, such that the subsequent use of force was caused by the entry onto property, rendering the use of force unreasonable. *Swofford*, 671 F. Supp. 2d at 1307-08; Appendix at 34. With regard to Deputy Morris, the district court held that the fact and manner of his entry onto Swofford's property are relevant to the reasonableness of his later use of force against Swofford because Morris' actions might be viewed as having "caused" the confrontation. The district court order stated that "[b]y entering the property without announcing or otherwise informing the property owner of their entry, a reasonable jury could find that Defendant's (Morris') own actions created this precarious position." *Swofford*, 671 F. Supp. 2d at 1307; Appendix at 34.

With regard to Deputy Remus, the district court stated that "a reasonable jury could infer that Defendant Remus's actions created or contributed to

the risk that ultimately resulted in the use of deadly force against Mr. Swofford." *Id.* at 1308; Appendix at 37-38. The district court, in traditional negligence language, went on to hold that "a reasonable jury could conclude that Remus's entry onto Swofford's property under such circumstances was objectively unreasonable and created a foreseeable risk of injury to the property owner." *Id.*; Appendix at 38-39.

These conclusions of law by the district court cannot be squared with the segmenting decisions represented by *Chappel* and *Dickerson*. As the Sixth Circuit put it in *Dickerson*:

> The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing.

Dickerson, 101 F.3d at 1161 (quoting *Plakas*, 19 F.3d at 1150).

That Swofford was uncertain as to the identity of the deputies does not change the fact that he approached them as illustrated in his expert's diagrams. Appendix at 48-50. The deputies had but a second to react to Swofford. They cannot turn back the clock

and wait for a helicopter. They cannot in that instant go back and take some other action to identify themselves as they enter the property; nor would it necessarily be advisable for them to do so as they searched for felony car burglars on the other side of a fence. They simply have to decide in that split-second whether to defend themselves from a man with a gun poised to shoot them in a second or less.

Declaring the deputies' use of deadly force unreasonable under the Fourth Amendment because the deputies entered Swofford's property without announcing themselves, or because the deputies did not wait for a helicopter, effectively constitutionalizes police operational negligence. None of those items, by themselves, would be unconstitutional. It is only by importing them into the analysis of the eventual use of force in the confrontation with Swofford that they take on constitutional dimension.

This case crystallizes the express conflict among the circuit courts as to whether an officer's own actions in creating or contributing to a confrontation are relevant to the reasonableness of the force he must use to end it. The case involves the weighing of competing and compelling interests: Swofford's right to defend his property against intruders he does not recognize versus the deputies' duty to pursue the car burglars and their right to defend themselves when it certainly appears that they are about to be fired upon. This Court should review this important issue to resolve the conflict among the circuits.

II. THE COURT SHOULD GRANT THE PETITION SO AS TO DECIDE WHETHER A WARNING IS CONSTITUTIONALLY REQUIRED PRIOR TO A DEPUTY'S USE OF DEADLY FORCE IN SELF-DEFENSE.

In *Garner*, this Court held that the factors to be considered for evaluating the constitutionality of use of deadly force by a law enforcement officer to prevent escape are: (1) whether the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or to others, or that he has committed a crime involving the infliction, or threatened infliction, of serious physical harm; (2) whether the law enforcement officer reasonably believes that the use of deadly force is necessary to prevent escape; and (3) whether the officer has given some warning about the possible use of deadly force, "if feasible." *Garner*, 471 U.S. at 11-12.

This Court has since cautioned that the decision in *Garner* was fact-specific and that the *Garner* factors will not translate well to every case involving the use of deadly force. *Scott v. Harris*, 550 U.S. 372, 382-83, 127 S. Ct. 1769 (2007) ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.").

In large measure, this is because the use of deadly force often involves split-second decision-making by a law enforcement officer under very dangerous, quick, and tense circumstances. *Graham*

v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989). Despite this Court's admonition that the lower courts must temper application of the *Garner* factors to the unique facts of each case, the lower courts here applied the warning requirement without regard to the split-second pressure facing the deputies.

Since *Garner* was issued in 1985, this Court has had occasion to discuss the application of the *Garner* factors in three § 1983 cases where the issue was the propriety of use of deadly force – in *Scott*; in *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378 (1989); and in *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596 (2004). Like *Garner*, however, all three of these other cases involved the use of force on suspects who were running away from law enforcement. The question in each was the reasonableness of use of force employed at least in part to prevent escape.

Although the *Garner* warning requirement is clearly ill-suited to a case like this one involving a split-second decision to use deadly force in self-defense, both the district court and the Eleventh Circuit denied qualified immunity to the deputies in large part based on a fact dispute as to whether the deputies gave a *Garner*-type warning to Swofford prior to the use of deadly force.

The deputies say they did provide warnings prior to firing on Swofford and Swofford says they gave warnings to him, but only as he was being shot. Neither the district court nor the Eleventh Circuit addressed the deputies' threshold argument that,

when faced with an armed Swofford one second from firing on them, it was not feasible to issue a warning before using deadly force to eliminate that threat.

Thus, this case squarely presents the question as to whether a *Garner*-type warning is constitutionally required under the circumstances illustrated by the diagrams in the Appendix, and where the deputies have only a second to react to the threat presented by Swofford.[2] The case naturally presents the subsidiary question of whether, even if a *Garner*-type warning was required, was that requirement "clearly established" at the time of this incident so as to overcome the deputies' entitlement to qualified immunity?

Qualified immunity protects law enforcement officers so that they may make decisions and take necessary action without the fear of a lawsuit. *Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 105 S. Ct. 2806 (1985). Use of force is judged objectively, and from the perspective of the deputies, not Swofford. *Graham*, 490 U.S. at 396-97. "The 'reasonableness' of a particular use of force must be judged from the perspective of

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[2] In the course of the litigation, Swofford has occasionally urged that his position as reflected in the expert diagrams is not threatening because his gun is not completely leveled at the deputies. However, as noted, his expert has testified that this position is the "ready" or "low ready" position for firing, and Swofford would have appeared prepared to fire on the deputies within one second The Fourth Amendment does not require that the deputies wait until Swofford fully levels his gun at them before defending themselves. *Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir 2001).

a reasonable officer on scene, rather than with the 20/20 vision of hindsight." *Id.*

Regardless of the fact that Swofford might not have realized that the deputies were law enforcement officers, it remains true that under Swofford's version of events, he was armed and would have objectively appeared able to fire on the deputies in one second, thus giving the deputies less than a second to make a life or death decision to defend themselves. Certainly, the deputies ought to at least receive qualified immunity given that objective threat. As the Fourth Circuit put it in *McClenagan v. Karnes*, 27 F.3d 1002 (4th Cir.1994), "For all [the officer] knew, the hesitation involved in giving a warning could easily cause such a warning to be his last." *Id.* at 1007.

The Court should be aware of the similarity of issues raised in this petition with issues raised in another pending petition, *City of Santa Rosa v. DeSantis*, 377 F. App'x 690 (9th Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3228 (U.S. Sept. 27, 2010) (No. 10-434). In *DeSantis*, a Ninth Circuit case, police were called to the home of a man who was firing a gun into his ceiling and acting strangely. *Id.* at 692 (O'Scannlain, J., dissenting). The officers arrived on scene and, after the man was coaxed from the home, he lunged at them. *Id.* at 691. The officers, believing based on earlier reports that he was still armed, shot and killed him. The family sued the officers and the city for which they worked, arguing among other things that the officers could have tried alternatives

to their use of deadly force or issued a warning before firing. *Id.*

The petition currently pending in that case asks whether the defendant officers should be entitled to qualified immunity notwithstanding the second-guessing on alternatives because they, like the deputies in this case, were faced with an immediate and objectively deadly threat. As here, the fundamental argument is that there is no time under such circumstances to give warnings, or to ponder alternatives, and so at least from a constitutional perspective the use of deadly force to seize and stop the threat is reasonable.

Arguably, part of the problem in *DeSantis*, as here, is that there is no clear direction from this Court as to the factors to be considered in evaluating the constitutionality of deadly force in self-defense where the city police officer, or the deputy sheriff, has but a moment to react to the threat against him. *Garner*, a fleeing felon case, does not represent a meaningful rule of decision for self-defense cases.

Of note, shortly after *Garner* was decided, the Court denied a petition for writ of certiorari from the Eleventh Circuit's decision in *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985), abrogation on other grounds recognized in *Nolin v. Isbell*, 207 F.3d 1253, 1255-56 (11th Cir. 2000), a case raising similar issues to the case at bar. (Denial of Petition for Writ of Certiorari reported at *Sampson v. Gilmere*, 476 U.S. 1124, 106 S. Ct. 1993 (Mem.) (1986).

Gilmere involved the shooting of a suspect who was struggling with officers, and who then lunged at them. An officer shot him. Chief Justice Burger, joined by Justice O'Connor, dissented from the denial of *certiorari* review, explaining that in his view *Garner* holds that an officer's use of deadly force in self-defense is constitutional where the officer simply has probable cause to believe that the suspect "poses a threat to the officer." *Id.* The warning requirement was not mentioned in this discussion, despite invocation of the decision in *Garner*.

In sum on this issue, this Court in *Garner* identified factors for use of deadly force when seizing a fleeing felon, including issuance of a warning, where feasible. This Court has emphasized that the *Garner* factors are not a "one size fits all" template for evaluating all use of force situations. Nonetheless, it is clear that the lower courts here imposed a *Garner*-type warning requirement even when under Swofford's version of events a warning was not feasible.

To date, this Court has not articulated the standard for evaluating use of force when an armed person is approaching, as opposed to fleeing, and is a direct, immediate, and objective threat to the life of the officer. This case presents an opportunity to either decide the relevant factors for such cases, or at a minimum to clarify that the *Garner* factors are not applicable to use of deadly force purely in self-defense.

III. THERE ARE IMPORTANT PUBLIC POLICY ISSUES AT STAKE IN THIS CASE.

Swofford would characterize the case as one in which he was an innocent property owner, rightfully protecting his property when he approached Morris and Remus, not recognizing them as law enforcement officers. Balanced against Swofford's interest in protecting his property, however, are Morris' and Remus' duty to pursue the felony car burglars and their own interest in protecting themselves when suddenly threatened by Swofford.

The deputies went onto Swofford's six acre property adjoining Barrington in the middle of the night and at a point far removed from any residence. There were weeds, an abandoned semi-tractor trailer, and storage and warehouse buildings. As they tracked the burglars, Swofford suddenly appeared before them, 20-25 feet away, gun in hand. He appeared ready to fire on them in a split-second. A *Garner*-type warning was not "feasible," and the fleeing felon scenario in *Garner* is a poor source of criteria for judging the deputies' actions in these circumstances.

The reasonableness of the deputies' use of force, and hence its constitutionality, is judged from the perspective of the deputies, not from the perspective of Swofford. In the instant they had to decide to defend themselves, it did not matter that Swofford was the property owner. It did not matter whether Swofford knew who they were. The use of deadly force violates the Fourth Amendment only if it represents

an unreasonable seizure, and it was not unreasonable for the deputies to shoot someone who, by Swofford's own account, appeared ready to shoot them in an instant.

The general circumstances giving rise to the issues in this case are bound to be repeated. There is considerable and earnest disagreement among the circuit courts as to how to approach the analysis of a case that involves criticism both of events leading up to a confrontation requiring use of deadly force and the circumstances immediately preceding the use of deadly force. William Morris, Jr., and Ronald Remus therefore respectfully request that the Court grant *certiorari* review of these important issues.

CONCLUSION

Because of the significance of the case beyond the interests of the parties to this lawsuit, and particularly because of the conflict in the circuit courts on segmenting, the Court should grant *certiorari* review of this case.

Respectfully submitted,

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William Morris, Jr., and Ronald Remus

2010 WL 3422565 (C.A.11 (Fla.))

United States Court of Appeals,
Eleventh Circuit.
Robert G. SWOFFORD, Jr., an individual,
Sharon L. Swofford, an individual, his wife,
Plaintiffs-Appellees,
v.
Donald ESLINGER, Defendant,
William Morris, Jr., Ronald Remus,
in their individual capacity,
Defendants-Appellants.
No. 09-16162
Non-Argument Calendar.

Sept. 1, 2010.

David A. Jones, Albert F. Tellechea, Victoria Heather Mitchell, Holland & Knight, LLP, Orlando, FL, Laurie Webb Daniel, Holland & Knight LLP, Atlanta, GA, for Plaintiffs-Appellees.

Donald Andrew Debevoise, Thomas W. Poulton, Debevoise & Poulton, P.A., Winter Park, FL, for Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 08-00066-CV-ORL-35-DAB.

Before EDMONDSON, PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Deputies William Morris and Ronald Remus of the Sheriff's Office of Seminole County, Florida,

appeal the denial of qualified immunity against Robert Swofford's complaint of excessive force. The district court concluded that genuine issues of material fact barred summary judgment, and we affirm.

The Swoffords filed a complaint against the deputies and Sheriff Donald Eslinger about injuries from an encounter between Robert Swofford and the deputies. Swofford, who encountered the deputies while armed and investigating a possible trespass on his land, alleged that the deputies used excessive force to disarm him. The deputies moved to dismiss the complaint based on qualified immunity, which the district court denied.

We review *de novo* the denial of summary judgment based on qualified immunity. *Skop v. City of Atlanta, GA*, 485 F.3d 1130, 1136 (11th Cir.2007). We construe all facts and make all reasonable inferences in the light most favorable to the nonmoving party. *Id.*

The district court did not err when it ruled that Morris and Remus were not entitled to qualified immunity. The record reveals material issues of fact about whether the deputies identified themselves to Swofford, the position of Swofford's gun, the need for Morris and Remus to shoot Swofford, and whether Remus should have intervened to prevent Morris's use of force. Morris and Remus testified that they identified themselves and warned Swofford repeatedly, but the radio transmission from the scene did not record the deputies speaking before

they fired their guns, and that recording is consistent with Swofford's version of events. The deputies also gave inconsistent statements about the position of Swofford's gun during the encounter. The deputies acknowledged that Swofford, a white male, did not match the description of the Hispanic suspects for whom the deputies were searching and that Swofford was likely the owner of the property. A reasonable jury could find that Morris and Remus violated Swofford's clearly established constitutional rights.

The denial of qualified immunity is **AFFIRMED**.

671 F.Supp.2d 1289

United States District Court,
M.D. Florida,
Orlando Division.
Robert G. SWOFFORD Jr., an individual,
and his wife, Sharon R. Swofford, an individual,
Plaintiffs,
v.
Donald ESLINGER, in his official capacity as
the Sheriff of Seminole County, Florida;
William Morris Jr., in his individual capacity;
and Donald Remus, in his individual capacity,
Defendants.
Case No.: 6:08-cv-00066-Orl-35DAB.

Nov. 30, 2009.

Albert F. Tellechea, David A. Jones, Luis Javier Gonzalez, Suzanne E. Gilbert, Amy Robin Rigdon, Kenneth J. Idle, Min Ki Cho, Victoria Heather Mitchell, Holland & Knight, LLP, Orlando, FL, for Plaintiffs.

D. Andrew Debevoise, Erin McCaughey Tueche, Thomas W. Poulton, Jeffrey K. Grant, Debevoise & Poulton, PA, Winter Park, FL, for Defendants.

ORDER

MARY S. SCRIVEN, District Judge.

THIS CAUSE comes before the Court for consideration of the Motion for Summary Judgment, filed by Defendants William Morris Jr. and Donald Remus on March 27, 2009 (Doc. No. 173), and Plaintiffs'

Memorandum in Opposition, filed on April 27, 2009 (Doc. No. 188). Defendants Morris and Remus move the Court to declare as a matter of law that Defendants are entitled to immunity from suit on all claims brought by Plaintiffs, pursuant to the doctrine of qualified immunity and Florida Statute § 768.28(9)(a). Upon consideration of all relevant filings and case law and being otherwise fully advised, the Court finds that Defendants' Motion for Summary Judgment (Doc. No. 173) should be **GRANTED in part and DENIED in part**.

I. Background

A. Case History

This case arises from the shooting of Plaintiff Robert Swofford by Defendants William Morris, Jr. and/or Ronald Remus ("Defendants") during the early morning hours of April 20, 2006. Morris and Remus, Deputies for Seminole County Sheriff's Office ("SCSO"), were pursuing two felony car burglary suspects when Defendants encountered an armed Mr. Swofford on Swofford's property and fired upon him. Donald Eslinger is a third defendant in this case, being sued in his official capacity as the Sheriff of Seminole County, State of Florida. The Amended Complaint, filed by Mr. Swofford and his wife, Sharon Swofford, on May 16, 2008, alleges claims against all Defendants, pursuant to 42 U.S.C. § 1983, for the use of excessive force and unlawful entry onto Swofford's property, in violation of his Fourth Amendment

rights, and seeks compensatory and punitive damages, plus interest, costs and attorneys' fees, pursuant to 42 U.S.C. § 1988. The Amended Complaint also alleges, on behalf of Mr. Swofford, state law claims of battery, gross negligence, simple negligence, and negligent training and supervision and, on behalf of Mrs. Swofford, a claim for loss of consortium. (Doc. No. 34.)

On March 27, 2009,[1] Defendants Morris and Remus filed the Motion presently before the Court, contending that they are entitled to immunity from suit on all claims brought by Plaintiffs, pursuant to the doctrine of qualified immunity and Florida Statute § 768.28(9)(a).[2] (Doc. No. 173.) Accordingly,

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[1] On March 2, 2009, Defendants Morris and Remus each filed separate motions for summary judgment. (Doc. Nos. 76, 77.) The motions were written such that Defendant Morris's motion focused primarily on the use of force issues, while Defendant Remus's motion focused on the entry onto property issues. However, the two Motions cross-referenced each other so as to incorporate the legal arguments of each with respect to both Defendants Morris and Remus. The Court ordered the motions be stricken, finding that the motions amounted to an impermissible attempt to circumvent the twenty-five page limitation for each party's motion, pursuant to Local Rule 3.01(a), and permitted Defendants Morris and Remus to re-file a joint memorandum in support of their Motions, not to exceed thirty total pages. (Doc. No. 157.)

[2] On November 11, 2008, Plaintiffs filed a motion, seeking sanctions against all Defendants for bad faith spoliation of multiple pieces of evidence. (Doc. No. 44.) The Court granted Plaintiffs' Motion, finding that Defendants had purposely destroyed or permitted the destruction of evidence requested by the Plaintiffs. (Doc. Nos. 233, 273.) The Court does not consider

(Continued on following page)

Defendants Morris and Remus request the Court to enter summary judgment in their favor on Mr. Swofford's federal claims because neither Morris's nor Remus's conduct violated Mr. Swofford's constitutional rights. Alternatively, even if a constitutional violation occurred, Mr. Swofford's rights were not clearly established at the time of the alleged violation. Additionally, Defendants claim they are entitled to summary judgment on Plaintiffs' state law claims because their actions on April 20, 2006, were reasonable. Upon consideration of the disputed and undisputed facts in this case, the Court finds that there are outstanding factual disputes which, at this time, preclude summary judgment in either Morris's or Remus's favor.

B. Facts of Record

Upon consideration of the many disputed facts in this record, most of which are relevant to the dispositive issues underlying the Motion, the Court is unable to decide as a matter of law that Defendants are entitled to qualified immunity. For the sake of clarity in the Court's recitation of the facts and explanation of its decision, the Court recounts separately the

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the sanctions in its disposition of the Motion for Summary Judgment. The Court notes, however, that viewed through the lens of the inferences and presumptions the jury will be permitted to engage, granting summary judgment is even more inappropriate.

undisputed and disputed facts pertinent to the Court's analysis.

1. Undisputed Facts

The following facts are undisputed in this case: During the early morning hours of April 20, 2006, Defendant Remus was on bicycle patrol in the Barrington at Mirror Lake Apartments, located in Seminole County, Florida. (Doc. No. 173 at 3.) The Barrington is located adjacent to Mr. Swofford's residential property, with a six-foot tall wooden privacy fence separating the two properties. (Doc. No. 188 at 2.) Mr. Swofford's property is approximately six to seven acres in size and has three addresses associated with it: 400, 410, and 420 Forest Lake Drive. Mr. Swofford initially lived on one of the parcels of land. After winning the Florida Lottery in 2004 (R. Swofford Dep. 110:13-19, Jan. 9, 2009), Mr. Swofford purchased the lots adjacent to his home to make them one property with one address, 400 Forest Lake Drive. *Id.* at 136:2-137:2. On April 20, 2006, Mr. Swofford's property contained Swofford's main residential home, a second residential home where an individual sometimes stayed for security purposes,[3] a garage area and an open nursery with a black plastic tarp. (Doc. No. 173 at 12.) Swofford's property also contained a tractor-trailer and an unknown number

[3] The facts indicate that the home was unoccupied at the time of the shooting. (Doc. No. 173 at 12.)

of cars on which Swofford worked. (Doc. No. 188 at 10.)

At approximately 2:28 a.m., Remus observed a car backed into a parking space at the apartment complex with its engine running and its lights off. *Id.* At the same time, Remus saw two Hispanic males attempting to "hotwire" a second car in the apartment complex parking lot. *Id.* at 4. When the two Hispanic men (the "Suspects") saw Remus, they ran toward the fence line separating the apartment complex and Swofford's property and then north along the fence. Remus chased the two men on his bicycle, but eventually lost sight of them. Remus assumes the two men jumped the fence, but he could not confirm that they did. "[He] heard the fence rattle and then didn't see them there anymore." (Remus Dep. 223:4-16, Jan. 13, 2009.)

At approximately the same time, 2:25 a.m., Mr. Swofford awoke to his dog barking at the back door. (Doc. No. 188 at 2.) After listening at the back door and not hearing anything, Mr. Swofford took his gun, locked the house, and went outside to inspect his property. Swofford did not put his gun into battery (i.e. load a cartridge into the gun's chamber). After leaving the house, Mr. Swofford went to his garage to check the doors and windows. Next, he walked past the vintage cars he was restoring to a bush where he knelt down to observe his property.

Meanwhile, after losing site of the Suspects, Remus peddled back to the point where he had noted

the first car with the engine running. Remus then followed the car as it pulled onto S.R. 436. Remus followed the car for about one mile until another officer was able to follow the car in a police vehicle. Once the second officer began following the car, Remus turned off of S.R. 436 and headed south on Forest Lake Drive to see if he could find the Suspects. Not finding them, Remus returned back to the apartment complex.

Defendant Morris was on duty with his K-9, "Strike," near the intersection of 17-92 and Maitland Boulevard when he heard radio traffic regarding Remus's pursuit of the Suspects. (Doc. No. 173 at 5.) At least eleven minutes elapsed between the time Remus lost sight of the Suspects, and Morris arrived at the apartment complex. (Doc. No. 188 at 3.) Morris parked his car on the street, close to the fence, and removed Strike from the vehicle. Morris was not in a hurry and did not know where the two Suspects were. *Id.* When Remus was asked whether he believed the two Suspects were in the "fenced-in property," Remus responded, "I don't know. The fenced-in area? I wouldn't say that. I would say they were in the area." (Remus Dep. 159:3-7, Jan. 13, 2009.)

Remus gave Morris a description of the two Hispanic, male Suspects (Morris Dep. 82:24-83:3, Dec. 15, 2008), but Remus did not tell Morris that he had patrolled Mr. Swofford's property previously or that Mr. Swofford's property contained a residence. (*Id.* at 111:16-112:2; Remus Dep. 121:1-23, Jan. 13, 2009.). Per Mr. Swofford's prior request that SCSO

patrol his property indefinitely, due to prior criminal activity, Remus had patrolled the property eleven times prior to the events on April 20, 2006, including one patrol that occurred less than three hours before the shooting of Mr. Swofford. (Doc. No. 173 at 7; Doc. No. 188 at 11.) Mr. Swofford had also told the SCSO that he and his property caretakers routinely patrol the property armed. (Doc. No. 188 at 11.)

At the same time that Morris arrived and was assessing the state of the "investigation" with Remus, other deputies began to arrive to set-up a perimeter to contain the Suspects. (Doc. No. 173 at 5.) A perimeter is used to "bed down" or surround suspects, so that they cannot escape the relevant area. (Remus Dep. 163:22-25, Jan. 13, 2009.) Remus asked for a perimeter, but neither Remus nor Morris determined for certain that a perimeter was set before they commenced their search.[4] (Doc. No. 173 at 5; Doc. No. 188 at 3.) Additionally, the police helicopter, "Alert," radioed that it was four minutes away from the scene. (Doc. No. 188 at 3.) Alert had both full spectrum and infrared capabilities to search area. *Id.* at 14. Morris and Remus decided not to await the arrival of the helicopter unit before continuing their "search." (Doc. No. 184, Exh. 2 at 5:75.)

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[4] Six deputies responded to various locations to set-up the perimeter (Doc. No. 83), but Morris saw only one deputy on perimeter duty with his patrol-car lights flashing. (Morris Dep. 119:18-23, Dec. 15, 2008.)

After more than eleven minutes had passed since Remus lost sight of the two Suspects (Doc. No. 184, Exh. 2 at 1:8, 5:81),[5] Morris and Remus began to search for them. (Doc. No. 173 at 6.) Remus directed Morris toward the area along the fence where Remus had last seen the Suspects. *Id.* Strike sniffed along the fence and came to a point in the fence where there was a hole.[6] Strike went through the hole. Morris then looked through the hole and saw, by Morris's account, what appeared to be "a business, maybe a nursery or something of that sort." (Doc. No. 173 at 6; Doc. No. 188 at 4.) Morris could see a tractor-trailer and an SUV on the property on the opposite side of the fence. Morris could also see a building in the distance. Morris pulled Strike back through the fence to find a place where Morris could breach the security of the fence. Finding a spot where there appeared to be two or three slats of the fence missing, Morris knocked out a few more slats and went through the opening in the fence to continue "tracking" with Strike. Remus followed, acting as the "cover deputy." Neither officer announced his entry or otherwise identified himself as each entered the property. (Doc. No. 188 at 4.)

Mr. Swofford, after kneeling down in a bush to observe his property for a few minutes, heard

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[5] SCSO's Basic Perimeter Training Materials state that a suspect can run 1 3/8 miles in ten minutes. (Doc. No. 184-4.)

[6] Morris testified that he did not know whether the two Suspects jumped over or ran under the fence.

someone on the other side of his fence say, "This looks like a good place we can get in," and then he heard the "squealing [of] somebody trying to pry something apart." (Doc. No. 92, Exh. A at 19:10-11.) Next, he heard a thump and then saw two bodies coming along the fence. (Doc. No. 173 at 13.) According to Mr. Swofford, the "tall or bigger guy in the front [was in] a full, looked like, dark uniform. . . ." (Doc. 92, Exh. 2 at 19:18-21.) Mr. Swofford "couldn't see anything on it other than it was full-sleeved." Mr. Swofford testified that he could not see any insignia on the two men's clothing. (R. Swofford Dep. 214:20-215:9; 219:-4, Jan. 6, 2009.) The second person was wearing a vest with a white T-shirt and black shorts. Mr. Swofford watched the two men scamper along the fence, with flashlights carried in an overhand or overhead position. At that time, Mr. Swofford did not realize that the two men were police officers, and he did not see a dog.

Once Morris, Strike, and Remus came through the fence, Strike started back on the "track" from the point at which he originally went under the fence. Strike led Morris around the tractor-trailer and between it and the SUV. As they got near the tractor-trailer, Remus was positioned off of Morris's left shoulder. Strike then raised his head, indicating that he had focused on something. (Doc. No. 173 at 8.) Morris looked up at that time and saw a white male. Morris testified that it occurred to him at the moment that he saw the man that the man could be the home owner. (Morris Dep. 154:25-155:11, Dec. 15, 2008.)

Remus testified that he knew, at the instant he saw the man, that he was not one of the two Hispanic males that the officers were pursuing. (Remus Dep. 174:23-25, Jan. 13, 2009.)

Mr. Swofford, crouched down with his gun in a two-handed grip, observed the flashlights as two men got closer to the trailer. When they got near the trailer, Mr. Swofford saw the flashlights start to split off, at which time Mr. Swofford shouted at the two men.[7] Thereafter, Mr. Swofford was shot multiple times. Mr. Swofford never fired a shot and never chambered a round in his gun. After Mr. Swofford was shot and lying on the ground, neither officer touched or otherwise rendered first aid to Mr. Swofford. (Remus Dep. 225:13-18, Jan. 13, 2009.) Alert arrived above the scene at the time of the shooting. The remaining facts pertinent to the shooting are in dispute and, thus, are discussed below.

2. Disputed Facts

The Record in this case is well-developed and filled with a myriad of expert reports. The factual disputes in this case are far too numerous to recount each one for the purpose of the Motion. In light of the following factual disputes, however, the Court finds that summary judgment in Defendants' favor is

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[7] According to Mr. Swofford, he shouted "Halt!" Defendant Morris testified that he could hear Mr. Swofford shout something, but he could not determine what he said.

unwarranted at this stage in the litigation and, therefore, that this case should proceed to trial.

The parties dispute facts material to whether Morris and Remus unlawfully entered Mr. Swofford's property, specifically in regard to the appearance of the Swoffords' property as Morris and Remus entered onto it through the fence. Remus asserts that the property on the opposite side of the fence appeared to Remus him to be abandoned, even though he had, pursuant to Mr. Swofford's request of the SCSO, patrolled it three hours before the shooting occurred. According to Remus, "[t]here's junk on it, there was a used trailer that just sat there with weeds growing." (Remus Dep. 169:11-12, Jan. 16, 2009.) However, according to Mrs. Swofford, the grass was mowed regularly, and Mrs. Swofford "would pull weeds and trim bushes to maintain a neat appearance. Since [the Swoffords] purchased the property, it has never been abandoned or neglected." (Doc. No. 188, Exh. 6, ¶ 6.)

The bulk of the disputed facts in this case surround the events that occurred immediately before, during, and just after the shooting of Mr. Swofford. Mr. Swofford testified that he does not recall moving toward the Defendants as he was crouched down, watching from the bush. (R. Swofford Dep. 233:16-21, Jan. 6, 2009.) He recalls yelling "Halt!", having a light shined in his eyes, and then he felt pain in his abdomen. Further, he recalls hearing a few shots, hearing someone yell "Seminole County Sheriff's Office," and then hearing a few more shots. *Id.* at

19-23. Mr. Swofford could not give a quantifiable distance between himself and Defendants at the time he was shot. (Doc. 92, Exh. 2 at 25:12-14.) Mr. Swofford contends that he never heard a warning or Defendants identify themselves prior the first shots being fired. The "SCSO . . . radio-dispatch recording from the approximate time of the shooting [contains] no recorded evidence of Remus or Morris identifying themselves to Mr. Swofford." (Doc. No. 184, Exh. 2 at 6.) Swofford further testified that he never raised his gun above his stomach. *Id.* at 234:4-5; *see also* Earnest Aff., Doc. No. 184, ¶¶ 5-7. According to Richard Earnest, an expert witness for the Plaintiffs, the physical evidence shows that, "at the time the Deputies fired their guns, Mr. Swofford's hands were together in a two handed grip on his firearm, his hands were in front of his waist and the firearm was pointed down towards the ground and not towards the Deputies." Mr. Swofford does not know the precise number of shots fired upon him, but stated that he has seven wounds from the incident and two "near misses" where the bullets "creased" him. (Doc. No. 92, Exh. 2 at 22:9-23:6.) Dr. Ronald K. Wright, Plaintiffs' expert witness, opines that Mr. Swofford suffered five gunshot wounds caused by three bullets. (Doc. No. 184, Exh. 7, ¶ 6.)

According to Defendants, however, Mr. Swofford was walking in their direction. Each Defendant contends that he gave at least three warnings to Mr. Swofford, each identifying himself as the "Sherriff's Office" and directing Mr. Swofford to put his gun

down. According to Morris, at the moment Strike looked up from his track, Swofford appeared as a silhouette walking towards him, holding a gun in his left hand, pointed to the ground. (Doc. No. 173 at 8.) Morris estimates that Mr. Swofford was forty to fifty feet away from him at that moment. (Morris Dep. 144:7-9, Dec. 15, 2009.) Morris asserts that he called out his first warning, and Mr. Swofford continued to walk toward them. Morris estimates that Mr. Swofford had advanced another five to ten feet when Morris called out his second warning. (*Id.* at 145:6-10.) When Mr. Swofford did not drop the gun, Morris called out his third warning and began to pull his gun out of his holster. Morris asserts that Mr. Swofford then began to raise his gun, reaching an area between Mr. Swofford's chest and stomach. At that time, Morris shot Mr. Swofford five times. Morris initially believed that he shot Mr. Swofford four times. (Doc. No. 173 at 9.) Morris estimates that he was approximately twenty-five to thirty feet away from Mr. Swofford at the time he shot him. *Id.* at 151:14-16.

Remus recounts that, from the moment the flashlight hit Mr. Swofford, Remus could see Mr. Swofford with the gun in his left hand, pointed directly at the Officers, rather than at the ground. (Remus Dep. 193:17-194:6, Jan. 13, 2009.) Remus testified that he gave three to five verbal warnings to Swofford and then fired at Mr. Swofford two times. *Id.* at 194:20-23; 217:5-6. Though Richard Ernest proffers that neither one of Remus's shots could have hit Mr. Swofford (Earnest Dep. 29:20-24 Jan. 14, 2009),

Remus believes that at least one bullet fired by him struck Mr. Swofford. (Remus Dep. 210:4-7, Jan. 13, 2009.)

II. Standards of Review

A. Summary Judgment

Summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Fennell v. Gilstrap,* 559 F.3d 1212, 1216 (11th Cir.2009) (citing *Welding Servs., Inc. v. Forman,* 509 F.3d 1351, 1356 (11th Cir.2007)). Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir.1991). Evidence is reviewed in the light most favorable to the non-moving party. *Fennell,* 559 F.3d at 1216 (citing *Welding Servs., Inc.,* 509 F.3d at 1356). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving party's case. *Denney v. City of Albany,* 247 F.3d 1172, 1181 (11th Cir.2001) (citation omitted). When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and

admissions on file, designate specific facts showing there is a genuine issue for trial. *Porter v. Ray,* 461 F.3d 1315, 1321 (11th Cir.2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. *Evers v. Gen. Motors Corp.,* 770 F.2d 984, 986 (11th Cir.1985) ("conclusory allegations without specific supporting facts have no probative value"). In the qualified immunity context, the Court must resolve all issues of material fact in Plaintiffs' favor and then answer the legal question of whether Defendants are entitled to qualified immunity under that version of the facts. *Case v. Eslinger,* 555 F.3d 1317, 1325 (11th Cir.2009) (citing *West v. Tillman,* 496 F.3d 1321, 1326 (11th Cir.2007)).

B. Qualified Immunity

Qualified immunity shields law enforcement officers from suit in their individual capacities concerning alleged federal constitutional violations that may arise while the officer is performing his discretionary functions, so long as the officer's conduct does not violate a clearly established statutory or constitutional right of which a reasonable officer would have known. *Case,* 555 F.3d at 1325. The qualified immunity analysis consists of three prongs. First, the officer must prove that he was acting within the scope of his discretionary authority when the alleged unconstitutional act took place. *Id.* After the officer satisfies the first prong, the burden shifts to the plaintiff to prove,

second, that the officer violated the plaintiff's constitutional rights and, third, that the right was clearly established "in light of the specific context of the case, not as a broad general proposition." *Id.* "The relevant query is whether it 'would be *clear* to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Maiorano v. Santiago,* No. 6:05-cv-107-Orl-19KRS, 2005 WL 1200882, at *7 (M.D.Fla. May 19, 2005) (quoting *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Further, the plaintiff must demonstrate that the right was clearly established by pointing to decisions of the United States Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the pertinent state, in this case, the Supreme Court of Florida, that provide clear notice of the violation. *Priester v. City of Riviera Beach, Fla.,* 208 F.3d 919, 926 (11th Cir.2000); *McClish v. Nugent,* 483 F.3d 1231, 1237 (11th Cir.2007).

Once the officer satisfies the first prong, the court has discretion to determine which prong of the qualified immunity analysis should be addressed next in light of the circumstances of the particular case at hand. *Case,* 555 F.3d at 1325. The plaintiff must prove both the second and third prong, or the officer is entitled to qualified immunity and, thus, summary judgment as a matter of law. *Id.* at 1327.

III. Discussion

The first prong of qualified immunity analysis – whether the officer was acting in the scope of his discretionary authority when the alleged unconstitutional act took place – is not in dispute with regard to any of Mr. Swofford's constitutional claims. The parties agree that Defendants Morris and Remus were acting within the scope of their discretionary authority when the events on April 20, 2006, took place, and thus, the burden shifts to Mr. Swofford to prove that qualified immunity is not appropriate in this case. The Court, therefore, next considers whether: (1) the officers violated Mr. Swofford's constitutional rights, specifically his Fourth Amendment rights to be free from unlawful entry onto property and excessive force, and (2) whether those rights were clearly established.

A. Unlawful Entry

1. Legal Standards

The Fourth Amendment protects individuals from unreasonable governmental intrusion into their "persons, houses, papers, and effects." *McLaughlin v. Elsberry, Inc.*, 868 F.2d 1525, 1529 (11th Cir.1988). The focus of Fourth Amendment analysis is whether society is prepared to recognize an expectation of privacy as reasonable. *McClish*, 483 F.3d at 1241. In addition to protecting the privacy within the house itself, the Fourth Amendment also protects the curtilage of the house, that is, the area immediately

surrounding a dwelling house. *United States v. Dunn,* 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); *see also United States v. Taylor,* 458 F.3d 1201, 1206 (11th Cir.2006) ("[C]urtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'. . . ." (citation omitted)). Though, "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Id.* (citing *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). In that regard, "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Oliver v. United States,* 466 U.S. 170, 178, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). "[O]pen fields surrounding a house are not protected under the fourth amendment[,] and [ ] a search of them need not be accompanied by a warrant issued upon probable cause." *United States v. Williams,* 581 F.2d 451, 453 (5th Cir.1978).[8] Further, "[a] perimeter fence around the property does not create a constitutionally protected interest in all open fields on the property." *Taylor,* 458 F.3d at 1208; *McClish,* 483 F.3d at 1237. To distinguish whether property is curtilage versus an open field, the court must consider four factors: "the proximity of the area claimed to be curtilage to

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[8] Cases decided by the Fifth Circuit before October 1, 1981, are binding precedent in the Eleventh Circuit today *Bonner v. Prichard,* 661 F.2d 1206 (11th Cir 1981) (en banc).

the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Dunn,* 480 U.S. at 301, 107 S.Ct. 1134; *see also Oliver,* 466 U.S. at 180 n. 11, 104 S.Ct. 1735 ("An open field need by neither 'open' nor a 'field' as those terms are used in common speech.").

Warrantless entry into the home or curtilage is unreasonable and, therefore, in violation of the Fourth Amendment, subject to only two exceptions: consent or "exigent circumstances." *McClish,* 483 F.3d at 1240-41; *see also Welsh v. Wisconsin,* 466 U.S. 740, 749, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) ("[E]xceptions to the warrant requirement are 'few in number and carefully delineated,' and the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches and arrests." (citation omitted)). Consent is not implicated in this case. Defendants proffer the exigent circumstances exception, which "recognizes a 'warrantless entry by criminal law enforcement officials may be legal where there is compelling need for official action and no time to secure a warrant.'" *United States v. Holloway,* 290 F.3d 1331, 1334 (11th Cir.2002) (citing *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)). Exigent circumstances which might justify warrantless searches include hot pursuit, protecting the safety of the police officers, and likelihood that the suspect will imminently flee. *Georgia v. Randolph,* 547 U.S. 103, 117

n. 6, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (citations omitted).

2. Analysis

Defendants contend that their warrantless entry onto Mr. Swofford's property was constitutional because the property was an open field. Alternatively, Defendants contend that exigent circumstances existed because Defendants were in hot pursuit of the two Suspects at the time of their entry. (Doc. No. 173 at 19.) The Court considers each contention in turn.

To determine whether Defendant Morris's and Defendant Remus's entry onto Mr. Swofford's property was lawful, the Court must decipher whether the property was curtilage or an open field. Considering the four factors enumerated in *Dunn,* the Court finds that, when the facts are viewed in the light most favorable to the Plaintiffs, a reasonable jury could find that the portion of Mr. Swofford's property entered upon by Defendants Morris and Remus was curtilage and, thus, protected from warrantless entry. First, Defendants contend that the "distance between the east side of the property where the home is located and the fence where the deputies entered[ ] is over 600 feet." (Doc. No. 173 at 21.) However, Plaintiffs suggest that Mr. Swofford was 140 yards from the residence when Defendant Morris first encountered him, a distance of only 420 feet. (Doc. No. 188 at 10.) Therefore, even if the point of entry was not curtilage, the point of contact with Mr. Swofford very

well may have been. Additionally, Defendants contend that the property appeared abandoned and overgrown with weeds. According to Plaintiffs, however, the grass was mowed regularly, and the property had never been abandoned or neglected since the Swoffords purchased it. With regard to the steps taken by the Swoffords to protect their property from observation, Defendants contend that the fence surrounding the Swoffords' property "is not consistently wood and at one point is easily seen through as chain link." (Doc. No. 173 at 23.) However, Plaintiffs allege that "the Fence was repaired as needed. . . . [T]he Swoffords' property was enclosed with a 6-foot tall wooden privacy fence and some chain link fencing like a traditional backyard . . . , protect[ing] their backyard from observation." (Doc. No. 188 at 10.) Considering these facts and viewing them in the light most favorable to the Plaintiff, a reasonable jury could find that Plaintiffs manifested a reasonable expectation of privacy in the area of the Swoffords' property upon which Defendants entered, and the property would therefore be protected against warrantless search.

Even if the area upon which Defendants entered and encountered Mr. Swofford is curtilage, Defendants are nonetheless entitled to qualified immunity if it would not be clear to a reasonable officer that the property entered upon was curtilage. "The standard of objective reasonableness which is used to assess an officer's entitlement to qualified immunity 'provides ample protection to all but the plainly incompetent or

those who knowingly violate the law.'" *Priester,* 208 F.3d 919, 925 (11th Cir.2000) (quoting *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). Thus, should an officer be reasonably mistaken as to the exact constitutional propriety of entering land, he or she should not face personal liability in such instances. *Maughon v. Bibb County,* 160 F.3d 658, 661 (11th Cir.1998). There is evidence in this case from which a jury could infer that both Defendant Morris and Defendant Remus knew, in fact, or reasonably should have known, that the property they entered upon was residential. As discussed below, that evidence is relevant to the Court's assessment of whether Defendants' use of deadly force against Mr. Swofford was reasonable. The fact that the property was residential, however, does not automatically render it cartilage, protected from warrantless entry. Mr. Swofford's property is over six acres in size, and by Plaintiff's own admission, "the proximity of the area where Morris encountered Swofford was approximately 140 yards from the residence." (Doc. 188 at 10.) "In *Dunn,* the Supreme Court held that a barn, used for storing chemicals, located some sixty yards from the house was not located within its curtilage for Fourth Amendment purposes." *Taylor,* 458 F.3d at 1207 (citing *Dunn,* 480 U.S. at 302, 107 S.Ct. 1134). Therefore, even if a reasonable jury could find that Defendants violated Mr. Swofford's Fourth Amendment right against unlawful entry, the Court cannot say that it would be clear to all reasonable officers that entry onto Mr. Swofford's property, both at the fence and to the point

at which the Defendants encountered Mr. Swofford, was unlawful. Because the Court cannot find that the property entered onto by Defendants was clearly defined as protected curtilage, the Court must **GRANT** summary judgment in favor of Defendants Morris and Remus on Mr. Swofford's unlawful entry claim.

In the alternative, Defendants also contend that their warrantless entry onto the Swoffords' property should be excused due to the exigent circumstance of hot pursuit. Upon review of the undisputed facts in this case, the Court finds as a matter of law that Defendants were not in hot pursuit of the two Suspects when Defendants entered onto the Swoffords' property. The United States Supreme Court has repeatedly found that hot pursuit requires a chase. *Hathcock v. Cohen,* 547 F.Supp.2d 1271, 1276 (S.D.Fla.2008) (citing *United States v. Santana,* 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976) and *Welsh v. Wisconsin,* 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984)). When Defendants Morris and Remus began to search with Strike, more than eleven minutes had passed from the time that Defendant Remus lost sight of the two Suspects. During those eleven minutes, Defendant Remus left the apartment complex on his bicycle, followed a car for about a mile, and then returned to the apartment complex and began briefing Deputy Morris. Further, Defendant Morris admits that he was not in a hurry when he arrived at the apartment complex and met Defendant Remus. Additionally, Defendant Morris did not know where the two Suspects were when Defendants began

to search the perimeter of Mr. Swofford's property, and Defendant Remus conceded that he did not know whether the two Suspects were within the fenced-in area. Lastly, Defendants have made no contention that the Suspects were armed or otherwise dangerous. *Hathcock v. Cohen,* 547 F.Supp.2d 1271, 1277 (S.D.Fla.2008) (The fact that the suspect was not armed during the commission of the offense weighed against a finding of hot pursuit). Considering these undisputed facts, the Court finds that neither Defendant was in hot pursuit when they entered onto Mr. Swofford's property. Nevertheless, Defendants' Motion for Summary Judgment as to Defendants' entitlement to qualified immunity on the unlawful entry claim is **GRANTED** because Mr. Swofford's right against unlawful entry under the circumstances was not clearly established.

B. Excessive Force

1. Legal Standard

Mr. Swofford's excessive force claim derives from the Fourth Amendment, which protects individuals from "unreasonable" seizures.[9] A police officer's use of force violates the Fourth Amendment if it is

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[9] "It is clear that the [intentional] 'apprehension by the use of deadly force is a seizure.'" *Vaughan v Cox,* 343 F.3d 1323, 1328 (11th Cir.2003) (citing *Garner,* 471 U.S. at 7, 105 S.Ct. 1694); *Troupe v. Sarasota County, Fla* , 419 F.3d 1160, 1166-67 (11th Cir.2005). The parties do not dispute that Mr. Swofford was subject to a seizure by Defendants.

objectively unreasonable in light of the circumstances. *Graham v. Connor,* 490 U.S. 386, 395-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The reasonableness of the use of force is evaluated with reference to the perspective of the deputy on scene at the time of the incident, not with the benefit of 20/20 hindsight. *Long v. Slaton,* 508 F.3d 576, 579-580 (11th Cir.2007). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham,* 490 U.S. at 397, 109 S.Ct. 1865. Deadly force is "reasonable" for the purposes of the Fourth Amendment when an officer "'(1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to the others' or 'that he has committed a crime involving the infliction or threatened infliction of serious physical harm;' (2) reasonably believes that the use of deadly force was necessary to prevent escape; ***and*** (3) has given some warning about the possible use of deadly force, ***if feasible.***" *Vaughan v. Cox,* 343 F.3d 1323, 1329-30 (11th Cir.2003) (quoting *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (emphasis added)). When the individual against whom the force was used is not a suspect, that factor weighs against a finding that the force used was reasonable. *See Hamilton v. City of Jackson, Alabama,* 261 Fed.Appx. 182, 186 (11th Cir.2008).

2. Analysis

Preliminarily, the Court addresses issues tangential to Mr. Swofford's excessive force claim raised by Defendants on summary judgment. First, Defendants contend that "the Court uses Plaintiff's *best* case to decide qualified immunity and thereby avoid deciding collateral issues presented based on conflicts of fact." (Doc. No. 173 at 26 (citing *Robinson v. Arrugueta,* 415 F.3d 1252 (11th Cir.2005))). Defendants continue, "if Swofford's best case is illustrated via, or at a minimum limited by, the physical evidence and the experts, Swofford should not be able to pose an alternative fact scenario that is inconsistent with his own experts and the physical evidence, just to avoid summary judgment." *Id.* at 26. While the Court agrees that Mr. Swofford's case on summary judgment must rest on more than just that which is metaphysically possible, Mr. Swofford's case can be based on evidence and facts proffered by either party. Mr. Swofford's best case is derived from the Court's viewing all facts of record in the light most favorable to him. *Robinson,* 415 F.3d at 1257. Therefore, with regard to the facts pertinent to Mr. Swofford's excessive force claim, the Court will consider all facts and evidence offered on the Motion by each party to determine whether Defendants' Motion should be granted as to qualified immunity on the excessive force claim against each Defendant Officer.

a. Whether Mr. Swofford Can Establish that a Violation of Mr. Swofford's Fourth Amendment Right to be Free of Excessive Force Occurred

i. Officer Morris

Viewing the facts in the light most favorable to Mr. Swofford, the Court finds that a reasonable jury could find that Defendant Morris's actions were objectively unreasonable in light of the facts and circumstances on April 20, 2006.

"[A]n excessive force claim presents a discrete constitutional violation relating to the manner in which an arrest was carried out, and is independent of whether law enforcement had the power to arrest." *Bashir v. Rockdale County, Ga.*, 445 F.3d 1323, 1332 (11th Cir.2006). While the unlawful entry and the excessive force claims should be analyzed separately, on the excessive force claim, the Court must consider the events leading up to the use of force to decipher whether the force used against Mr. Swofford was objectively unreasonable. Significantly, "[d]efendants cannot claim the protection of qualified immunity when their own objectively unreasonable actions created the very risk that generated the eventual use of deadly force." *Bletz v. Gribble,* 640 F.Supp.2d 907, 919 (W.D.Mich.2009) (citing *Yates,* 941 F.2d at 447, and *Kirby v. Duva,* 530 F.3d 475, 482 (6th Cir.2008) ("Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive.")); *see also Estate of Starks v. Enyart,* 5

F.3d 230, 233-234 (7th Cir.1993). Therefore, regardless of whether Morris's entry onto the Swoffords' property was unlawful, his decision to enter and search the property under such circumstances is relevant to whether his ultimate decision to use deadly force against Mr. Swofford was objectively unreasonable and, therefore, unlawful.

At the time Defendant Morris arrived at the apartment complex to meet Defendant Remus (approximately 2:46 a.m.), at least eleven minutes had passed since Remus last saw the Suspects, and Alert was four minutes away from the premises. Rather than contact the SCSO to obtain information regarding the nature of the property, confirm that a police perimeter was secured, or wait for Alert to arrive to help search for the Suspects, Defendant Morris ripped away protective fencing and entered onto what he knew to be enclosed, private property to begin searching for the two Suspects, without first attempting to contact the property owner. Further, it is undisputed that both Morris and Remus entered the property without announcing their entry or illuminating the lights on Morris's police car to indicate their presence. In light of these facts, a reasonable jury could conclude that Morris's entry onto Mr. Swofford's property under such circumstances was objectively unreasonable. *See Yates v. City of Cleveland,* 941 F.2d 444, 447 (6th Cir.1991) ("It was not 'objectively reasonable' for [defendant officer] to enter the dark hallway at 2:45 a.m. without identifying himself as a police officer, without shining a flashlight, and

without wearing a hat."); *Miller v. United States*, 357 U.S. 301, 314 n. 12, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) ("Compliance [with knock and announce] is also a safeguard for police themselves who might be mistaken for prowlers and be shot down by a fearful householder."). Considering *Yates*, the Court finds that the mere presence of a flashlight in the instant case does not render Defendants' entry onto Mr. Swofford's property reasonable.

Once Morris and Remus entered the property, they followed Strike's lead in and around Mr. Swofford's property, ultimately leading them to their encounter with Mr. Swofford. According to Morris's own testimony, at the moment that Strike raised his head and Morris first saw Mr. Swofford, Morris believed that Mr. Swofford was likely the homeowner. By Mr. Swofford's account, at that moment, Mr. Swofford was crouched down by a bush, and his firearm was initially pointed at the ground.[10] Mr. Swofford was lawfully armed and legally entitled to protect his property. FLA. STAT. §§ 776.012, 776.013 (West 2005); (Remus Dep. 212:15-25, Jan. 13,2009.). Accepting Mr. Swofford's account, at that instant, Mr. Swofford shouted "Halt!", and then Defendant Morris, without identifying himself or offering a warning to Mr. Swofford, shot Mr. Swofford twice. Next, Mr. Swofford recalls hearing, "Seminole County

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[10] Viewing the facts in the light most favorable to Mr. Swofford, Mr. Swofford's gun never came above his stomach and, thus, allegedly never reached the fire position.

Sheriff's Office," and then being shot a few more times.

Viewing the facts in the light most favorable to Mr. Swofford, a reasonable jury could find that Defendant Morris unlawfully and unreasonably entered upon Mr. Swofford's property, and then, without warning and with knowledge that Mr. Swofford was not one of the two Suspects for whom they were searching, unreasonably used deadly force upon Mr. Swofford. Defendant Morris contends to the contrary, arguing that, in light of the reasonableness factors set forth in *Garner,* his use of deadly force against Mr. Swofford was reasonable. Morris contends that the first *Garner* factor, that Morris had "probable cause to believe that the suspect posed a threat of serious physical harm," weighs in his favor. Certainly, the sight of an individual holding a gun in a dark yard during the middle of the night may invoke the fear of serious physical harm. However, Defendants admittedly were aware that Mr. Swofford was not one of their suspects and that he was likely the property owner who was lawfully entitled to possess a firearm to protect his residence from intruders. By entering the property without announcing or otherwise informing the property owner of their entry, a reasonable jury could find that Defendants' own actions created this precarious position. *See Hamilton,* 261 Fed.Appx. at 186; *Bletz,* 640 F.Supp.2d at 919-20. Further, by shining a flashlight in Mr. Swofford's eyes and failing to warn Mr. Swofford to put the gun down or to identify themselves, as contended by Mr. Swofford, a

reasonable jury could infer that Defendant Morris's decision to resort to deadly force at that instant was unreasonable. *See Bletz,* 640 F.Supp.2d at 919 ("This argument [unsuccessfully] attempts to justify Defendants' entire course of unreasonable conduct by reference to one split-second decision during which Defendants may legitimately have feared for their lives.").

The second *Garner* factor, concerning use of force to prevent escape, weighs against a finding of reasonableness because Defendants knew that Mr. Swofford was not a suspect, and there are no facts of record to suggest that Mr. Swofford ever attempted to flee. As to the third factor, whether a warning was given, Defendants contend on the one hand that they provided warnings to Mr. Swofford before shooting him (Doc. No. 173 at 9-10), but on the other hand, suggest that providing a warning before shooting Mr. Swofford was not feasible, in light of Mr. Swofford's version of the facts. *Id.* at 28. If Mr. Swofford's version of events is believed, a reasonable jury could find that it was feasible for Defendants to give a warning and that no warning was given. Therefore, upon consideration of the foregoing, the Court cannot say as a matter of law that Defendant Morris's decision to use of deadly force was objectively reasonable.

ii. Officer Remus

The analysis of the second prong of qualified immunity as it pertains to Defendant Remus is

similar to that for Defendant Morris. However, concerning the analysis for Defendant Remus, there is a factual dispute as to whether any of the shots fired by Defendant Remus ever struck Mr. Swofford. Specifically, Defendant Remus contends he "is independently entitled to summary judgment on all use of force and battery claims because Plaintiffs' expert has testified that Remus' shots missed." (Doc. No. 173 at 28.) The Court finds this contention unavailing. Defendant Remus testified at his deposition that he believes at least one bullet fired by him on April 20, 2006, struck Mr. Swofford. Defendants note, however, that Richard Ernest, the Swoffords' expert witness, proffers that neither one of Remus's shots could have hit Mr. Swofford. (Doc. No. 173 at 28.) Viewing the facts in the light most favorable to Mr. Swofford, a reasonable jury would be free to reject the opinion of Plaintiffs' expert, whose opinions Defendants will undoubtedly assail. The jury could, in that event, credit Defendant Remus's own admission that at least one of the bullets fired by Defendant Remus struck Mr. Swofford.

Further, even if these facts were insufficient to support a jury finding that one of Remus's bullets hit Mr. Swofford, Defendant Remus would not automatically be entitled to summary judgment on Mr. Swofford's excessive force claim. It is well settled in the Eleventh Circuit that "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance."

Fundiller v. City of Cooper City, 777 F.2d 1436, 1442 (11th Cir.1985); *Trammell v. Thomason,* 335 Fed.Appx. 835, 843 (11th Cir.2009); *see also Grandstaff v. City of Borger, Tex.,* 767 F.2d 161, 168 (5th Cir.1985) (finding that, because the use of force was a joint operation, each participant could be liable despite the inability to decipher which defendant fired the shot that killed the plaintiff). Defendants argue to the contrary, citing *Troupe v. Sarasota County, Fla.,* a § 1983 case in which the Court found that a defendant officer's single-missed shot was not the proximate cause of any injury to the plaintiff. 419 F.3d 1160, 1165 (11th Cir.2005). However, *Troupe* is distinguishable from the instant case because the Court in *Troupe* found that *none* of the three defendant officers involved in the case was the "proximate cause" of the Plaintiff's injuries. In this case, however, the parties agree that at least one of the Defendants involved in the shooting of Mr. Swofford on the night of April 20, 2006, proximately caused Mr. Swofford's injuries. Therefore, even if a jury finds that none of the rounds discharged by Defendant Remus struck Mr. Swofford, Defendant Remus could still be liable if the jury finds that he failed to take feasible steps to protect Mr. Swofford from Defendant Morris's use of force, assuming Morris's use of force is found to be unlawful.

As with Defendant Morris, considering the events leading up to Defendant Remus's entry on to Mr. Swofford's property, a reasonable jury could infer that Defendant Remus's actions created or contributed to the risk that ultimately resulted in the use of deadly

force against Mr. Swofford. In this regard, the facts of record are even more compelling against Remus. Remus had patrolled the property eleven times prior to the events on April 20, 2006, including one patrol that occurred less than three hours before the shooting. Remus knew that the property comprised of 400, 410, and 420 Forest Lake Drive – Mr. Swofford's property – was residential property, and he knew where the residence was located. Based on Remus's knowledge of the prior criminal activity targeting the property, Mr. Swofford's requests that the property be patrolled, and Remus's knowledge that the property was residential, it was reasonably foreseeable to Remus that the officers might encounter a homeowner on the property. Yet, as Defendant Remus admits, he never informed Morris about Mr. Swofford's patrol requests, his knowledge of the property, or that the property was residential. Nevertheless, Remus's knowledge can be imputed to Morris because Remus and Morris were working in close concert with each other. *Stassi v. United States,* 410 F.2d 946, 952 n. 7 (5th Cir.1969) (citing *United States v. Romero,* 249 F.2d 371, 374 (2d Cir.1957)). Further, Remus never took any action to ensure that the property owner was notified regarding the two Suspects or Defendants' intended entry onto the property. Viewing these facts and those previously discussed herein concerning Officer Morris in the light most favorable to the Plaintiff, a reasonable jury could conclude that Remus's entry onto Mr. Swofford's property under such circumstances was objectively unreasonable and

created a foreseeable risk of injury to the property owner.

Thus, even if a reasonable jury finds that Defendant Remus did not shoot Mr. Swofford, the jury could still find that Defendant Remus violated Mr. Swofford's Fourth Amendment Right to be free from excessive force by failing to take feasible steps to protect Mr. Swofford from Defendant Morris's excessive use of force. Remus knew at the moment that he encountered Mr. Swofford that Mr. Swofford was not one of the two Suspects for whom they were searching. Thus, not only did Defendant Remus fail to inform Defendant Morris about the nature of the property, but also, when viewing the facts in the light most favorable to Mr. Swofford, Remus took no action to protect Mr. Swofford from Defendant Morris's use of deadly force. Remus did not announce himself to Mr. Swofford or warn Mr. Swofford to drop his firearm. Considering these facts, a reasonable jury could conclude that Remus failed to take steps that were feasible to protect Mr. Swofford from Defendant Morris's use of deadly force and, therefore, violated Mr. Swofford's Fourth Amendment right. *See Grandstaff,* 767 F.2d at 168 ("The firestorm that killed [the plaintiff] was in all respects a joint operation: the same recklessness, the same circumstances, and the same object. Each participant was as much at fault as the others, and all are liable for the foreseeable consequences.").

b. Whether Mr. Swofford's Fourth Amendment Right to be Free of Excessive Force was Well Established Under the Circumstances

The Defendants contend that, even if they used excessive force in this circumstance, Mr. Swofford's constitutional right to be free from excessive force in the context of this case was not clearly established at the time Defendants acted to infringe those rights. Considering *Garner,* however, and viewing the facts in the light most favorable to Mr. Swofford, the Court finds that, indeed, Mr. Swofford's rights were clearly established. 471 U.S. 1, 105 S.Ct. 1694 (1985). Mr. Swofford was not a suspect, he was not attempting to escape, and it was feasible for Defendants to voice a warning to him before they fired shots.

It is simply not normal for law enforcement officers to tear down privacy fencing in a non-exigent search for suspects, enter unannounced onto a homeowner's property, and shoot him, unprovoked in his own backyard, knowing full well that he was not one of the suspects. Viewed in the light most favorable to Mr. Swofford, this is what the evidence would prove occurred. If constitutional protection against that risk is not bedrock, it is hard to envision what is.

Even if this right was not clearly established, which the Court finds that it was, in excessive force cases, the Eleventh Circuit has "recognized a narrow exception to the rule requiring particularized case law." *Hamilton,* 261 Fed.Appx. at 187. To overcome a

qualified immunity defense, a plaintiff can demonstrate, alternatively, "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." *Priester*, 208 F.3d at 926-27.

The Court recognizes that the exception to the particularized case law requirement is narrow. *Id.* When viewing the facts in the light most favorable to Mr. Swofford, though, the Court finds that every reasonable officer in the position in which Defendants put themselves on the night of April 20, 2006, would conclude that the use of deadly force against Mr. Swofford was unlawful. The use of deadly force is clearly unlawful when an officer enters upon private property without indicating his or her presence, searches the property, encounters the property owner whom the officer knows is likely lawfully armed on his own property and not a suspect, and then fails to give a warning or to identify himself to the property owner before shooting him.

Therefore, Defendants' Motion for Summary Judgment as to Defendants' entitlement to qualified immunity against Mr. Swofford's excessive force claim is **DENIED**. However, Defendants Morris and Remus "are not foreclosed from asserting a qualified immunity defense at trial." *Vaughan*, 343 F.3d at 1333 (citations omitted). Should the jury choose to reject Plaintiffs' version of the facts, or the facts not be presented at trial as alleged on summary judgment,

the qualified immunity analysis will inevitably change. In this regard, Defendants may seek special interrogatories to the jury to resolve factual disputes going to the qualified immunity defense. *Id.*

C. Mr. Swofford's Claim for Punitive Damages

Defendants Morris and Remus contend that they are entitled to dismissal of all claims for punitive damages. Punitive damages may be awarded against an officer under § 1983 when a defendant's conduct was "motivated by evil motive or intent, or when it involves a reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The Court finds Defendants are not entitled to summary judgment on Plaintiffs' claim for punitive damages. If the jury accepts Plaintiffs' version of the facts, a jury could reasonably conclude that Defendants Morris and Remus were, at the very least, callously indifferent to Mr. Swofford's federally protected rights. Therefore, summary judgment in Defendants' favor with respect to Mr. Swofford's claims for punitive damages is **DENIED**.

D. State Law Claims

i. Mr. Swofford's State Law Claims

Defendants Morris and Remus suggest that they are entitled to summary judgment on all state law claims because they are immune from suit pursuant

to § 768.28(9)(a), Florida Statutes. According to § 768.28(9)(a):

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Defendants contend that there is no evidence that they acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights safety, or property. (Doc. No. 173 at 2.) Defendants further contend that they are entitled to summary judgment on Mr. Swofford's state law claims for excessive force or battery and for negligence because their use of deadly force was reasonable, necessary, justified, and privileged. Aside from identifying § 768.28(9)(a), Defendants provide no legal or factual support for their contentions on each of the state law claims

In light of the Court's analysis concerning qualified immunity and considering the many factual disputes in this case, the Court finds that the issue of whether Defendants' use of deadly force was reasonable, necessary, justified, and/or privileged ought to be put to the jury. *See Prieto v. Malgor*, 361 F.3d 1313,

1320 (11th Cir.2004) (quoting *McGhee v. Volusia County*, 679 So.2d 729, 733 (Fla.1996)). The Court cannot say as a matter of law that Defendants did not act with wanton and willful disregard of human rights, safety, or property or that Defendants acted reasonably if Mr. Swofford's version of the facts is accepted. Therefore, summary judgment in Defendants' favor on all of Mr. Swofford's state law claims is **DENIED**.

ii. Mrs. Swofford's Claim for Loss of Consortium

Defendants Morris and Remus contend that they are entitled to summary judgment on Mrs. Swofford's claim for loss of consortium because "it is a derivative claim which fails when judgment is due on the state law claims brought by Mr. Swofford." (Doc. No. 173 at 2.) Because the Court did not grant summary judgment in Defendants' favor concerning Mr. Swofford's claims, the Court must also deny summary judgment in Defendants' favor on Mrs. Swofford's claim for loss of consortium.

IV. Conclusion

For the reasons stated above, Defendants' Motion for Summary Judgment as to all of Plaintiffs' claims (Doc. No. 173) is **GRANTED in part** and **DENIED in part**. Defendants' Motion is **GRANTED** as to Mr. Swofford's claim of unlawful entry, pursuant to the

doctrine of qualified immunity. Defendants' Motion is **DENIED** as to all other claims.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-16162-JJ

ROBERT G. SWOFFORD, JR.,
an individual,
SHARON L. SWOFFORD,
an individual, his wife,

Plaintiffs-Appellees,

versus

DONALD ESLINGER

Defendant,

WILLIAM MORRIS, JR.,
RONALD REMUS,
in their individual capacity,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 25, 2010)

Before: EDMONDSON, PRYOR AND ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

IMAGE 6

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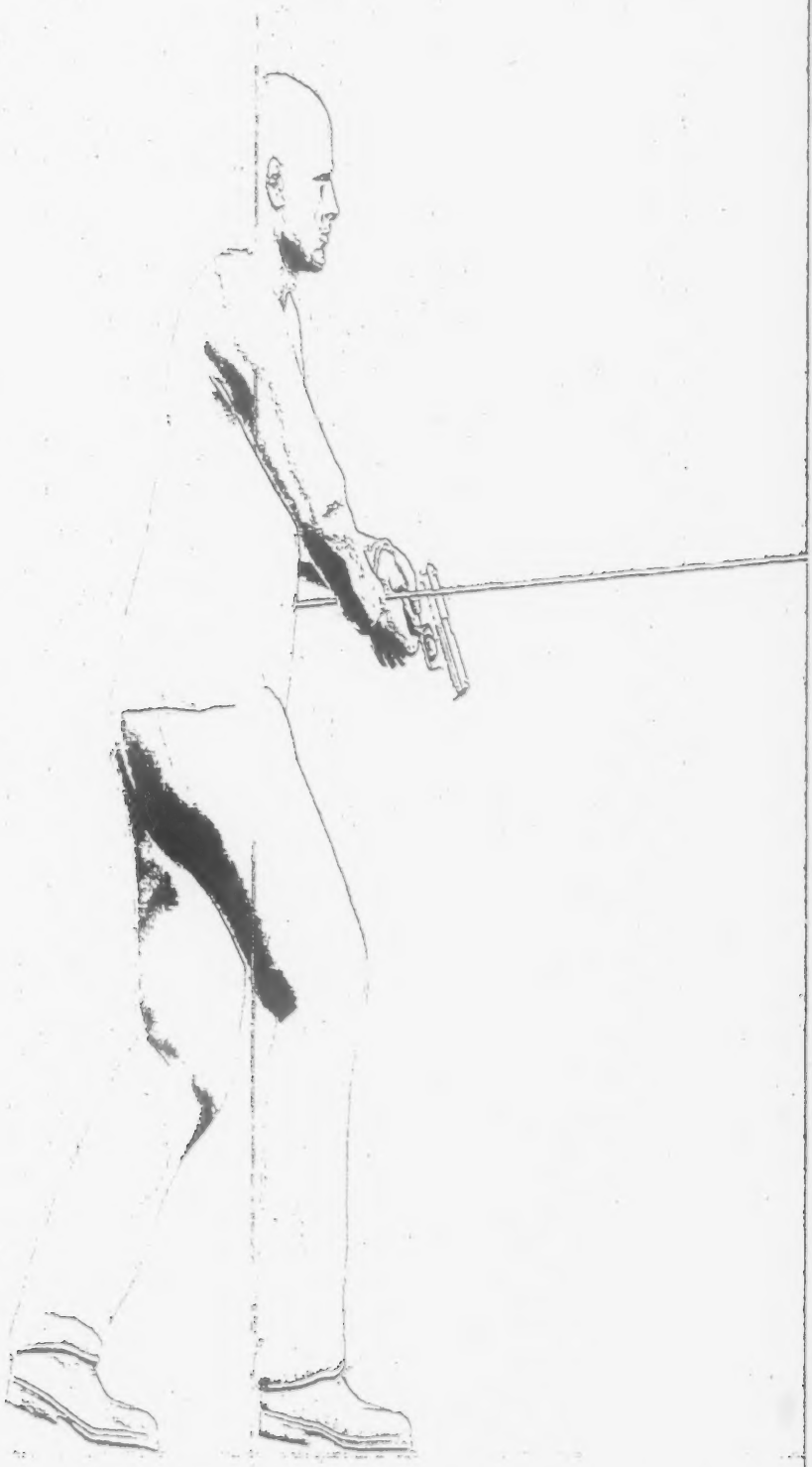

IMAGE 7

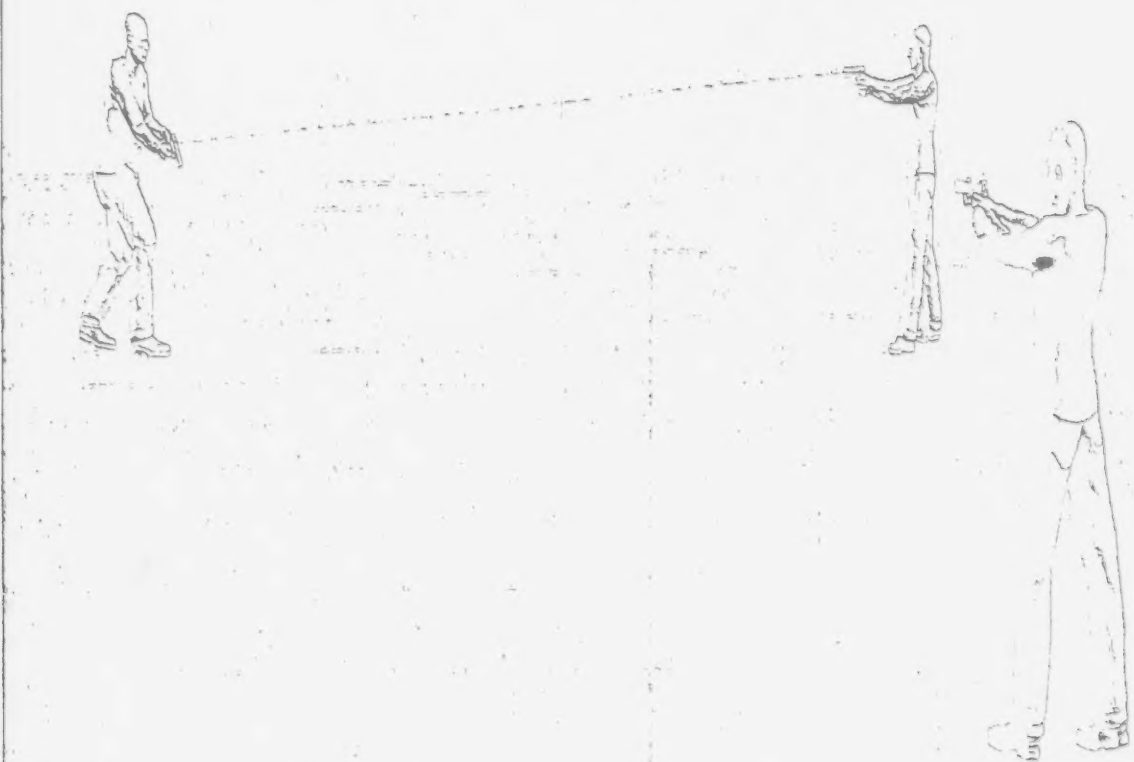

IMAGE 8